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Re Chai Min Sin; ex parte MBf Finance Bhd

HIGH COURT (MIRI) — BANKRUPTCY PROCEEDINGS NO 29–200 OF 2001(MR)
ABDUL AZIZ ABDUL RAHIM JC
25 AUGUST 2003

B

Bankruptcy *— Practice and procedure — Stay of proceedings — Whether granting of stay at the discretion of court — Whether same principles applicable to stay of execution and stay of bankruptcy proceeding*

C ***Civil Procedure*** *— Stay of proceedings — Application for — Sufficient grounds — Whether special circumstances to be shown — Whether the ground of bona fide appeal a category of special circumstances — Whether same principles applicable to stay of execution and stay of bankruptcy proceeding*

This concerned the judgment debtor's ('debtor's) appeal against the decision of the Deputy Registrar dismissing with costs the debtor's D application for a stay of bankruptcy proceedings in the High Court pending an appeal to the Court of Appeal. His appeal to the Court of Appeal was against the decision of the Judicial Commissioner who had earlier dismissed the debtor's application to set aside a judgment in default of appearance entered in the sessions court which had formed the basis of the bankruptcy proceedings against him. Counsel for the E judgment debtor contended that the High Court ought to grant the stay as the appeal to the Court of Appeal was a bona fide appeal.

Held, dismissing the appeal with costs:

(1) Rule 179 of the English Bankruptcy Rules 1952 which is in pari F materia with r 137 of the Malaysian Bankruptcy Rules 1967 does not prevent a court from making a receiving order where there is an appeal pending. The High Court's understanding of the rule is that if a debtor has applied to set aside the bankruptcy notice within the period specified in the notice for the debtor to satisfy the judgment sum or where a stay of proceedings has been G granted, then a receiving order should not be made against the debtor. The rule does not change the settled law that the granting or non-granting of a stay of a bankruptcy proceeding pursuant to ss 6(4) and 97 of the Bankruptcy Act 1967 is at the discretion of the court (see p 699G–I).

H (2) It is not wise or possible to list all the possible grounds that can be considered sufficient to grant a stay. Each case has to be decided on its own facts guided by the established principles which have been settled by authorities. For a ground to be considered sufficient, it must also show special circumstances (see p 700E–F); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] I 3 MLJ 49 followed. It is not sufficient to say that there is merit in the appeal or the appeal would likely be successful. The grounds which are considered sufficient and show special circumstances

must be apparent from the affidavit in support of the application for stay (see p 701A); *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337 followed. A

(3) The principles applicable to a stay of execution and a stay of a bankruptcy proceeding are the same. Both have the effect of temporarily depriving the successful party the fruits of litigation. Thus, a stay is a stay regardless of whether it is in respect of an execution or a bankruptcy. In fact, the commencement of a bankruptcy proceeding against a party who has been ordered to pay a judgment sum is a form of execution (see p 701B–D). B

(4) The ground of a bona fide appeal may be classified as a category of special circumstances that may be considered by the court in order to grant or not to grant a stay. In order for the ground of bona fide appeal to qualify as a special circumstance, the court must find as a matter of fact that the basis of the bankruptcy proceeding is non-existent (see p 701D–F); *Re Noble (a bankrupt), Ex parte the Bankrupt v The Official Receiver and Anor* [1964] 2 All ER 522 followed. On the facts, the debtor's application for stay did not disclose any ground that could be considered sufficient ot would give rise to special circumstances (see p 702F–H). C D

[Bahasa Malaysia summary E

Ini adalah berkaitan rayuan penghutang penghakiman ('penghutang') terhadap keputusan timbalan pendaftar yang menolak permohonan penghutang dengan kos untuk satu penggantungan prosiding kebankrapan di Mahkamah Tinggi sementara menunggu satu rayuan di Mahkamah Rayuan. Rayuan beliau di Mahkamah Rayuan adalah terhadap keputusan pesuruhjaya kehakiman yang sebelum itu telah menolak satu permohonan penghutang untuk mengenepikan satu penghakiman ingkar kehadiran di mahkamah sesyen yang membentuk asas prosiding kebankrapan terhadap beliau. Peguam bagi pihak penghutang penghakiman telah berhujah bahawa Mahkamah Tinggi sepatutnya membenarkan penggantungan tersebut memandangkan rayuan di Mahkamah Rayuan tersebut merupakan satu rayuan bona fide. F G

Diputuskan, menolak rayuan dengan kos:

(1) Kaedah 179 Kaedah-Kaedah Kebankrapan Inggeris 1952 yang in pari materia dengan k 137 Kaedah-Kaedah Kebankrapan 1967 Malaysia tidak menghalang sebuah mahkamah daripada membuat satu perintah penerimaan sementara menunggu satu rayuan. Pemahaman Mahkamah Tinggi terhadap kaedah tersebut adalah di mana jika seorang penghutang telah memohon untuk mengenepikan satu notis kebankrapan dalam tempoh yang ditetapkan dalam notis tersebut untuk menyelesaikan jumlah penghakiman atau di mana satu penggantungan prosiding telah dibenarkan, maka satu perintah penerimaan tidak sepatutnya H I

dibuat terhadap penghutang. Kaedah tersebut tidak mengubahkan undang-undang tetap di mana pemberian atau sebaliknya satu penggantungan satu prosiding kebankrapan menurut ss 6(4) dan 97 Akta Kebankrapan Act 1967 adalah dalam budi bicara mahkamah (lihat ms 699G–I).

(2) Ia tidak patut atau mungkin untuk menyenaraikan alasan-alasan yang berkemungkinan yang boleh dianggap mencukupi untuk membenarkan satu penggantungan. Setiap kes perlu diputuskan berdasarkan fakta-faktanya yang tersendiri berpandukan prinsip-prinsip yang ditetapkan yang oleh autoriti-autoriti. Untuk satu alasan dianggap mencukupi, ia perlu juga menunjukkan keadaan-keadaan istimewa (lihat ms 700E–F); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 diikut. Ia tidak mencukupi untuk mengatakan bahawa terdapat merit dalam rayuan tersebut atau rayuan tersebut besar kemungkinan akan berjaya. Alasan-alasan yang dianggap mencukupi dan menunjukkan keadaan-keadaan istimewa harus dinyatakan dengan jelas dalam afidavit sokongan untuk permohonan satu penggantungan (lihat ms 701A); *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337 diikut.

(3) Prinsip-prinsip yang sedia ada terpakai untuk satu penggantungan perlaksanaan dan satu penggantungan prosiding kebankrapan adalah sama. Kedua-duanya mempunyai kesan yang akan menghalang pihak yang berjaya menikmati kitigasinya. Oleh itu, satu penggantungan adalah satu penggantungan tidak kira sama ada ia berkaitan satu perlaksanaan atau satu kebankrapan. Bahkan, permulaan satu prosiding kebankrapan terhadap satu pihak yang telah diperintahkan untuk membayar satu jumlah penghakiman adalah satu bentuk perlaksanaan (lihat ms 701B–D).

(4) Rayuan bona fide boleh diklasifikasikan sebagai satu kategori keadaan-keadaan istimewa yang akan dianggap oleh mahkamah bagi tujuan membenarkan atau tidak satu penggantungan. Bagi tujuan alasan rayuan bona fide untuk melayakkannya sebagai satu keadaan istimewa, mahkamah perlu memutuskan berdasarkan fakta bahawa asas prosiding kebankrapan tidak wujud (lihat ms 701D–F); *Re Noble (a bankrupt), Ex parte the Bankrupt v The Official Receiver and Anor* [1964] 2 All ER 522 diikut. Berdasarkan fakta-fakta, permohonan penghutang untuk penggantungan tidak menunjukkan apa-apa alasan yang boleh dianggap keadaan-keadaan istimewa (lihat ms 702F–H).]

Notes

For cases on applications for stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5503–5513.

For cases on practices and procedures for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2511–2513.

Cases referred to

A debtor, Re (No 44 of 1978); Ex parte the Debtor v Chantry Mount and Hawthorns Ltd [1979] 3 All ER 265 (refd)

Khoo Kay, Re; Ex p Tan Tiak Chye [1999] 6 MLJ 637 (refd)

Tan Ah Poi, Re; Ex p Multi Purpose Finance Bhd [1999] 2 MLJ 555 (refd)

Chor Saw Onn, Re; Ex p Tan Jiak Chye [2001] 6 MLJ 61 (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (folld)

Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337 (folld)

Noble (a bankrupt), Re, Ex parte the Bankrupt v The Official Receiver and Anor [1964] 2 All ER 522 (folld)

Walter Su, Re; Ex parte United Malayan Banking Corpn Bhd [1987] 1 MLJ 44 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 6(4, 97

Bankruptcy Rules 1952 [Eng] r 179

Bankruptcy Rules 1967 r 137

Tai Choi Yu (*Tai Choi Yu & Co*) for the judgment debtor.

Louis Achuk (*Kadir Wong Lin & Co*) for the judgment creditor.

Abdul Aziz Abdul Rahim JC: This is an appeal by the judgment debtor against the decision of the learned deputy registrar in dismissing with costs the judgment debtor's summons in chambers (encl 18) application for stay of all bankruptcy proceedings before the High Court pending the disposal of the appeal to the Court of Appeal by the judgment debtor against the decision of the learned Sulaiman Daud JC (as he then was) dated 4 October 1997 dismissing the judgment debtor's appeal to set aside a sessions court decision in Summons No 52–312–97 (allowing judgment in default of appearance against the judgment debtor in favour of the judgment creditor). The judgment of the sessions court is the basis of the bankruptcy proceedings taken against the judgment debtor by the judgment creditor.

As to the power of the Court to grant a stay, reference is made to ss 6(4) and 97 of the Bankruptcy Act 1967 which are reproduce below:

> 6(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the Court may if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment.

and

> 97 Power to stay proceedings

> The Court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

In this appeal, the counsel for judgment creditor, Mr Louis Achuk, submitted a written submission. But the counsel for the judgment debtor, Mr Tai Choi Yu, did not. In any case, the counsel for the judgment debtor/appellant submitted that he had only one ground to raise in the appeal that is the judgment debtor's appeal against the Sulaiman Daud JC (as he then was) is still pending before the Court of Appeal and therefore the bankruptcy proceedings before this court ought to be stayed until the outcome of the appeal is known. On the same point, counsel for the judgment debtor/appellant further submitted that the court ought to grant the stay because the appeal before the Court of Appeal was a bona fide appeal. To support his argument, the counsel for the judgment debtor/appellant, Mr Tai, cited a passage at para 590 of *Halsbury Laws of England* (3rd Ed) Vol 2 at pp 310–311 which states the English position as to principles applicable for stay in bankruptcy proceedings in England. Mr. Tai also referred to two English cases. The first case is *Re A debtor (No 44 of 1978); Ex parte the Debtor v Chantry Mount and Hawthorns Ltd* [1979] 3 All ER 265 which held that r 179 of the English Bankruptcy Rules 1952 does not in itself prevent a receiving order being made where an appeal was pending, although normally the court would stand over the application to make the receiving order where there was a bona fide appeal against refusal to set aside a bankruptcy notice which was being pursued with diligence.

Rule 179 of the English Bankruptcy Rules 1952 is in pari material with our r 137 of the Bankruptcy Rules 1967 and it states as follows:

> A receiving order shall not be made against a debtor on a petition in which the act of bankruptcy alleged is non-compliance with a bankruptcy notice within the appointed time where such debtor has applied to set aside such notice until after the hearing of the application or where the notice has been set aside or during a stay of the proceedings thereon; but in such case the petition shall be adjourned or dismissed as the court thinks fit.

In my view, the above rule does not prevent a court from making a receiving order where there is an appeal pending. My understanding of the said rule is that if the debtor has applied to set aside the bankruptcy notice within the period specified in the notice for the debtor to satisfy the judgment sum or where a stay of proceedings had been granted, then a receiving order should not be made against the debtor. In my view, the above rule does not change the settled law that the granting or non-granting of a stay of a bankruptcy proceeding pursuant to ss 6(4) and 97 of the Act is at the discretion of the court. The judgment debtor cannot claim a stay as a matter of right. This is also the position in England. This can be seen from the footnote at p 310 to the passage in *Halsbury* cited by Mr Tai above. In fact, the note goes further, by referring to an English case of *Re French, Ex parte French,* to comment that if the registrar in the exercise of his discretion, refuses a stay, his decision will not be interfered with on appeal, unless the discretion was wrongly exercised.

The second case cited by Mr Tai for the debtor/appellant is *Re Noble (a bankrupt), Ex parte The Bankrupt v The Official Receiver and Anor* [1964] 2 All ER 522 which also applied the same principle that the receiving order ought not to be made if the registrar was satisfied the appeal was bona fide. But in that case, the receiving order was set aside because the court found that the basis for the bankruptcy proceedings did not exist. For that reason, the appeal was said to be bona fide although in that case the court eventually dismissed the appeal on other grounds.

On the part of the judgment creditor, learned counsel, Mr Louise Achuk submitted that the court has a discretion whether or not to grant a stay and that the judgment debtor cannot claim a stay as of right. He cited the case of *Re Walter Su; Ex parte United Malayan Banking Corpn Bhd* [1987] 1 MLJ 44. In that case also, Mohammed Dzaiddin J (as he then was) held that the mere fact that an appeal is pending over the judgment is not sufficient ground for staying the proceedings upon petition. The learned judge also held that the court will not enquire into the validity of a judgment debt unless there is evidence that the judgment had been obtained by fraud or collusion, or that there has been some miscarriage of justice. The same principle was followed in later cases that come after *Re Walter Su* (see *Re Khoo Kay; Ex p Tan Tiak Chye* [1999] 6 MLJ 637; *Re Tan Ah Poi; Ex p Multi Purpose Finance Bhd* [1999] 2 MLJ 555; *Re Chor Saw Onn; Ex p Tan Jiak Chye* [2001] 6 MLJ 61 and the Court of Appeal's decision in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2000] 3 AMR 2867).

So what are sufficient grounds which the court may consider in exercising its discretion to grant a stay order. In the first place I do not think that it is wise or possible to list all the possible grounds that can be considered sufficient to grant a stay. I think each case has to be decided on its own facts guided by the established principles which have been settled by the authorities. As a guide, I may quote from the passage in *Ming Ann's* holdings above where Abdul Hamid Mohamad JCA at p 2868 of the AMR journal says:

> On the authorities, it would appear that it is a unanimous view that whether or not a stay of execution pending appeal should be granted, it an exercise discretion by the court based on established principles. It further appears from the weight of authorities that special circumstances must be special, not ordinary, common or usual circumstances that goes to the execution of the judgment and not to the validity or correctness of the judgment or merits of the appeal. It is a common view that merits of appeal (or correctness or validity of the judgment) does not amount to special circumstances.

From the above passage, it can be culled that for a ground to be considered sufficient, it must also show special circumstances. For example, the grounds must convince the court that if the stay order is not given the execution of the judgment will result in gross injustice to the party against whom the judgment was made. It is not sufficient to say that there is merit in the appeal or the appeal would likely be successful.

A The grounds which are considered sufficient and showed special circumstances must be apparent from the affidavit in support of the application for stay (see the Supreme Court case of *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337).

Mr Tai for the judgment debtor/appellant submitted that the principle B of special circumstances, as elaborated in Ming Ann's case is applicable only to stay of execution. But for stay of bankruptcy proceedings the principle applicable is bona fide appeal. It is true that *Ming Ann*'s case was concerned with the stay of execution. So was the case of Seow Teow Guan [1995] 3 MLJ 598, a Court of Appeal decision which was considered in *Ming Ann*'s case. The question is should there be any difference in principles applicable C between a stay of execution and a stay of a bankruptcy proceeding? Both have the effect of depriving the successful party the fruits of the litigation, albeit temporarily. To me, it makes no different. In my view, a stay is a stay regardless of whether it is in respect of an execution or a bankruptcy. In fact, I would go a step further and suggest that the commencement of a bankruptcy proceeding against a party who has been ordered to pay a D judgment sum is a form of execution. Therefore, the principles applicable should be the same.

Thus, in my view the ground of bona fide appeal may be classified as one of the category of special circumstances that may be considered by the court in order to grant or not to grant a stay in the same manner as the Court E of Appeal said in *Ming Ann*'s case as regard the ground that the appeal will become nugatory if a stay is not allowed. In that case the Court of Appeal said there is no new ground such as nugatory; it is one of the ground that need to be considered under the heading of special circumstances. In my view the ground of bona fide appeal, to qualify as special circumstance, must reach the level of *Re Noble* where the court found as a matter of fact F that the basis of the bankruptcy proceeding is non existent.

In this case, before me, the judgment debtor/appellant affidavit of Chai Min Sin affirmed on 1 July 2002 in support of judgment debtor's application for stay did not disclose any ground that can be considered sufficient or gives rise to special circumstances. The affidavit averred only G to the fact that the judgment debtor is appealing against the High Court order dismissing judgment debtor appeal to set aside the judgment of the sessions court and that the appeal is pending. In addition, the judgment debtor also averred in the said affidavit that if the stay is not granted it will render his appeal to the court of appeal, if successful, nugatory and he will suffer irreparable damage and prejudiced. However, the judgment debtor H did not provide the facts or the evidence in the said affidavit to show in what way he would suffered irreparable damage or that he would be prejudice. In the absence of these evidence or facts, it will be impossible for the court to form a reasonable opinion as to whether the grounds raised to get the order for stay are sufficient or not. Mere allegations without sufficient facts or I evidence to support such allegations are not enough.

Furthermore, in this case the appeal to the Court of Appeal is against the decision of the learned judicial commissioner in dismissing the appeal

by the judgment debtor to set aside the default judgment entered by the sessions court in favour of the judgment creditor/respondent. One would therefore give sufficient credit to the trial judge that he had considered all aspect of the appeal before he decided to dismiss it. In that circumstance, one cannot assumed that the decision of the learned judge is wrong. In any case, the fact that there is an appeal pending is not sufficient ground to grant a stay. Therefore, to go further on this point would mean going into the merit of the appeal which this court should refrain from so doing.

In the circumstance, I dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon